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# Fixing Florida's Execution Lien Law Part Two: Florida's New Judgment Lien on Personal Property

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# FIXING FLORIDA’S EXECUTION LIEN LAW PART TWO: FLORIDA’S NEW JUDGMENT LIEN ON PERSONAL PROPERTY

*Jeffrey Davis\**

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\* Professor of Law, University of Florida Levin School of Law. Five years ago I published in this Law Review an essay in which I argued that existing Florida execution lien law was out of date and severely flawed. Jeffrey Davis, *Fixing Florida Execution Lien Law*, 48 FLA. L. REV. 657 (1996). That essay is the “Part One” to which I implicitly refer in the title of this Article. In that essay, I recommended replacement of the existing scheme with a centrally filed judgment lien, and pointed out that a Special Committee of the Business Section of The Florida Bar was considering the matter. In 1998, the Section first proposed the legislation that eventually became Florida’s new Judgment Lien Law.

With the Governor's signature on June 13, 2000, chapter 2000-258 became law, codified as Florida Statutes sections 55.201-.209. Before becoming effective, it was immediately amended and improved in the next session by the Glitch Bill, H.B. 601.<sup>1</sup> Thus, on October 1, 2001, Florida debtor-creditor law left the Fourteenth Century and entered the Twenty-First. No longer will delivery of writs of execution to a sheriff create inchoate liens on personal property within the county. Instead, creditors holding a judgment may now file a "judgment lien certificate" with the Department of State and obtain a lien on all of the judgment debtor's leviable personal property in the state.<sup>2</sup> Prospective buyers, lenders, employers, landlords, and blind dates can check one central file to discover any judgment lien certificates that may have been filed against a person with whom they are considering dealing. The new system will do a much better job of meeting the age-old objectives of American debtor-creditor law: protecting against unfair surprise and encouraging and rewarding diligent creditors.

The original bill was drafted and sponsored by the Business Section of The Florida Bar, which appointed a Special Committee on Post-Judgment Remedies, chaired by Michael Williamson, then an extraordinary lawyer who has since become a bankruptcy judge. I served as the Reporter for the Special Committee and participated in the three-year drafting process as well as the three-year process of shepherding the original and "Glitch" bills through the legislative process. The goal of the Special Committee was to improve Florida debt collection law in a number of ways, but the primary purpose of the bill was to revamp the process of obtaining an execution lien on personal property. Led by the Business Section's lobbyist, a Tallahassee lawyer named William B. Wiley, we talked to and took into account the views of numerous affected groups, including the Florida Sheriffs Association, the Florida Bankers Association, the Florida Association of County Clerks, the Florida Department of Revenue, the Florida Department of State, and the Public Interest Law Section of The Florida Bar.

Under both the prior and current laws, a creditor seeking to satisfy a judgment out of property of the judgment debtor obtains a writ of execution from the clerk of the court that issued the judgment and then delivers the writ to a sheriff in one of Florida's sixty-seven counties. The writ commands the sheriff to levy on property of the debtor until the amount stated in the writ is satisfied.<sup>3</sup> Under the prior law, delivery of the

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1. H.B. 601, 2001 Leg., Reg. Sess. (Fla. 2001). This discussion is based on the statute as amended. A copy of the Glitch Bill can be obtained from Online Sunshine, *available at* <http://www.leg.state.fl.us>.

2. See FLA. STAT. §§ 55.202-.205 (2001).

3. FLA. R. CIV. P. FORM 1.914 (2001).

writ to the sheriff not only initiated the execution process, but under the seminal case of *Love v. Williams*,<sup>4</sup> it also created an inchoate lien on all personal property subject to execution in that county. The sheriff was required to keep a record of the delivery of such writs in an execution docket.<sup>5</sup> If the judgment debt was not satisfied out of the proceeds of the initial levy, or if there were no levy, the sheriff would keep the writ and the inchoate lien would continue, attaching to any new personal property the debtor might bring into the county. The effect of the inchoate lien was that if anyone were to cause the sheriff to levy on personalty of the debtor, the inchoate lien would ripen into a true lien which would date from the original moment of delivery to the sheriff. Having levied, the sheriff would sell under the writ first delivered.<sup>6</sup> The proceeds of the execution sale were then distributed in the order in which the existing writs had been delivered to the sheriff.<sup>7</sup>

As I have discussed elsewhere,<sup>8</sup> there were two significant problems with this process. The foremost criticism was that the inchoate lien operated as a secret lien. Most people buying or lending against property did not know of or bother to check the sheriff's docket to see if the property might be subject to an inchoate execution lien.<sup>9</sup> If so, and if the sheriff were later to levy on the property, they would lose it.<sup>10</sup> This result flies squarely in the face of the fundamental policy in debtor-creditor law of protecting good faith transferees from unfair surprise.<sup>11</sup> The second major criticism of the process was that it had the occasional effect of insulating debtors from the collection efforts of diligent creditors.<sup>12</sup> Imagine a would-be diligent judgment creditor who found nonexempt property of the debtor and took steps to levy on it, only to check the docket and discover a number of prior inchoate lienors passively waiting for someone else to come along and levy on the property of the debtor. If the buildup of prior writs was substantial enough, the judgment creditor's only reasonable response would be to give up. The debtor then would continue to enjoy assets that could have been applied to payment of the debt, insulated from the efforts of the diligent judgment creditor by the buildup of prior inchoate liens.<sup>13</sup> The new lien law has a number of salutary

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4. 4 Fla. 126 (1851).

5. FLA. STAT. § 30.17(1) (1866). On Oct. 1, 2001, the sheriffs ceased docketing writs of execution. FLA. STAT. § 30.17(4) (2001).

6. See *Love*, 4 Fla. at 134.

7. See *id.*

8. Jeffrey Davis, *Fixing Florida Execution Lien Law*, 48 FLA. L. REV. 657 (1996).

9. *Id.* at 659.

10. See *id.*

11. *Id.* at 657-58.

12. See *id.* at 663.

13. Based on the results of a small empirical study in Alachua County, I have estimated that

features, but the primary motivation to enact it was the desire to eliminate these problems.<sup>14</sup>

One common solution to these problems, is to adopt the lien-on-levy rule. If no lien on property exists until it is levied upon, there is no secret lien, no buildup of prior liens, and nothing to discourage an active creditor from levying. However, in today's world the stigma of filing bankruptcy is largely gone. Experience has shown that levy on any significant asset, particularly in the business setting, normally forces the debtor immediately into bankruptcy, subjecting the new lien acquired on levy to the trustee's preference attack.<sup>15</sup> One of the salutary features of the old law, relating the date of the lien back to the date the writ was delivered to the sheriff, was that as long as the delivery was more than ninety days prior to levy, the lien was protected from preference attack. The new law retains this benefit, which explains why the lien-on-levy approach was discarded in favor of the central filing approach.<sup>16</sup>

My purpose here is to describe and provide examples as to how the new law is intended to work, how it intersects with other law, how portions of the law came into being, what problems concerned us, and how we sought to remedy those concerns. I also point out areas in which the statute is flawed or inadequate and suggest how, consistent with the goals of the statute, those problems might be approached.

## I. THE SCOPE OF THE LIEN

Any holder of a judgment that is enforceable in Florida may acquire the new judgment lien by filing a judgment lien certificate.<sup>17</sup> The reach of the judgment lien is limited to the kinds of personal property on which one can obtain an execution lien.<sup>18</sup> Section 55.202(2) states: "A judgment lien may

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as many as one-quarter to one-third of the creditors delivering writs of execution to the sheriff find at least one creditor ahead in line. *Id.* at 665.

14. One of the obvious salutary features of the new law is the ease of access to information on debtors who are not paying their judgments. A prospective lender or buyer can look to the central file to discover all of the competing judgment lien creditors, rather than having to search the sheriff's dockets in each of the counties in which the debtor might have personal property. This notoriety and ease of access may make it more difficult for a debtor with unpaid judgments to sell or borrow against nonexempt personal property. It also may make it more difficult to engage in other types of business. This will provide added incentive for judgment debtors who can pay their judgment debts to do so.

15. The Bankruptcy Code permits the trustee to avoid transfers of the debtor's property within the 90 days prior to bankruptcy. 11 U.S.C. § 547 (2001).

16. FLA. STAT. § 55.202(2)(b) (2001).

17. *Id.* § 55.202(1)(a).

18. Some lawyers argued that the scope of the lien should be broader than the current execution lien. The Special Committee that drafted the legislation resisted these suggestions. Creditors may still reach intangibles and other types of personalty through a common law creditors'

be acquired on a judgment debtor's interest in all personal property in this state subject to execution under § 56.061, other than fixtures, money, negotiable instruments, and mortgages."<sup>19</sup>

Most of the exceptions are there for belt-and-suspenders effect. Aside from fixtures, liens upon which are better left to real estate and secured transactions law, money and negotiable instruments are usually not currently subject to execution,<sup>20</sup> and mortgages are not personal property.

Florida Statutes section 56.061 describes property subject to execution. Leaving out real property, it states,

goods and chattels, equities of redemption in . . . personal property, and stock in corporations, shall be subject to levy and sale under execution. Likewise, the interest in personal property in possession of a vendee under a retained title contract or conditionals sale contract shall be subject to levy and sale under execution to satisfy a judgment against the vendee. This shall be done by making the levy on such personal property.<sup>21</sup>

While goods and chattels are normally easy enough to identify, a few Florida cases extend the reach of the section in a way that raises interesting questions. Of course, these "reach" questions existed under the old inchoate-lien rule as well,<sup>22</sup> but now that the judgment lien is statewide, these questions may become more important. Courts sometimes adopt surprising views as to what are "goods and chattels . . . and stock in corporations."<sup>23</sup> Somewhat curiously, it has been held that one can execute on a liquor license under the authority of section 56.061,<sup>24</sup> so purchasers of taverns and restaurants need to be wary of the judgment lien.<sup>25</sup> Moreover, the cases under Article 2 of the Uniform Commercial Code (U.C.C.)<sup>26</sup> suggest that new definitional problems may be evolving. Courts

bill or proceedings in aid of execution. *Id.* § 56.29. The question of whether the types of property subject to execution or to the judgment lien should be expanded was left for another day.

19. *Id.* § 55.202(2).

20. Under Florida Statutes section 55.09, one can levy on the "current money" of a corporation, whatever that is. Nevertheless, the judgment lien does not attach to it. Even if one could obtain an execution lien on money and negotiable instruments by taking them into possession, a lien obtained by recording, which might interfere with negotiability, would make no sense. *Id.* § 55.202(2).

21. *Id.* § 56.061.

22. *B.A. Lott, Inc. v. Padgett*, 14 So. 2d 669, 670 (Fla. 1943).

23. FLA. STAT. § 56.061 (2001).

24. *Coney v. First State Bank*, 405 So. 2d 257, 259 (Fla. 1981).

25. Moreover, one wonders what happens to the lien if the State terminates the license of the debtor and issues a new one to the buyer.

26. U.C.C. art. 2 (2001).

have held that software is goods,<sup>27</sup> and even that shares in a real estate cooperative are goods.<sup>28</sup> Of course, these cases are not necessarily determinative of the meaning of “goods and chattels” under Florida Statutes section 56.061, but chapter 56 does not define goods, and it would not be irrational for a court to look to the definition of goods in Florida Statutes chapter 672<sup>29</sup> for guidance.

The reach of the phrase “stock in corporations,” is also potentially uncertain. At the time the phrase was first employed, in the Nineteenth Century, only corporations issued stock. Today, one can buy stock in other types of entities, such as real estate cooperatives. If such stock is not goods, and surely it is not,<sup>30</sup> and is also not “stock in a corporation,” it would seem not to be subject to execution, and therefore invulnerable to the judgment lien. A careful creditor who discovers that the debtor owns such stock should not rely on having filed a judgment lien certificate, nor should such a creditor be deterred by the previous filings of others from pursuing the stock through court order.

In recent years, Florida has adopted a number of uniform acts revising the regulation of partnerships,<sup>31</sup> limited partnerships,<sup>32</sup> and limited liability partnerships.<sup>33</sup> Despite previous case law permitting levy on a partner’s interest in a partnership,<sup>34</sup> these statutes now make clear that interests in these types of entities may not be reached through execution. Rather, a judgment creditor must obtain from a court a charging order, which

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27. *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991). It is hard to imagine how one executes on software or sells it at auction. On the other hand, the ability of a lien holder to interfere with the sale and/or licensing of software could create significant leverage in the creditor.

28. *Chien v. Tova Realty*, 573 N.Y.S.2d 855, 856 (N.Y. Civ. Ct. 1991). The court gave no explanation for its conclusion beyond this: “shares in a cooperative are personalty and thus goods as defined in Article 2 of the Uniform Commercial Code . . . .” *Id.*

29. FLA. STAT. § 672.105(1) (2000).

30. Goods are tangible things not represented by the writing on a piece of paper. Yet, the U.C.C. Article 2 definition of goods could conceivably be read to mean otherwise. Section 2-105(2) of the Uniform Commercial Code defines goods as “all things . . . which are movable . . . other than the money in which the price is to be paid, investment securities (Article 8) and things in action.” U.C.C. § 105(2) (2001). Because the definition focuses on what is movable, rather than what is tangible, this definition could be read to suggest that any investment securities *not* covered by Article 8 are goods. But this would be absurd.

31. Florida Revised Uniform Partnership Act, FLA. STAT. §§ 620.81001-.9902 (adopted in 1995).

32. Florida Revised Uniform Limited Partnership Act, FLA. STAT. §§ 620.101-.186 (adopted in 1986).

33. The revised limited liability partnership provisions, adopted in 1999, repealed the previously adopted Registered Limited Liability Partnership provisions and replaced them with numerous substantive provisions scattered throughout the Florida Revised Uniform Partnership Act. See STUART R. COHN & STUART D. AMES, *FLORIDA BUSINESS LAWS ANNOTATED* 201-02 (2000-2001).

34. *B.A. Lott, Inc. v. Padgett*, 14 So. 2d 669, 670 (Fla. 1943).

constitutes a lien on the debtor's transferrable interest.<sup>35</sup> A relatively new entity, the limited liability company, also has been created by the legislature.<sup>36</sup> Unlike the statutes regulating the various forms of partnerships, the Florida Limited Liability Company Act does not mention the process through which a judgment creditor of a holder of an interest in a limited liability company might foreclose on that interest. As a practical matter, a share in a limited liability company is much more like a share in a corporation than a share in a partnership.<sup>37</sup> Accordingly, there may be little justification for permitting execution on stock of a corporation, and thus attachment of the judgment lien, but not on shares in a limited liability company. Nevertheless, unless a court reads the phrase "stock of a corporation" broadly, the judgment lien will not attach. Creditors will have to proceed via creditors' bill to reach shares in a limited liability company.

Another question is presented by the case law holding that one cannot levy on property *in custodia legis*—property that has been levied upon and remains in the custody of the sheriff.<sup>38</sup> If the property is of the type that is subject to execution, such as goods, this implies that the judgment lien does not attach to goods in the hands of the sheriff.<sup>39</sup> Under the prior law, there was no need to levy on property that had already been seized because the sheriff was already bound to distribute the proceeds to all creditors who had delivered writs of execution to him or her.<sup>40</sup> The sheriff was to pay out in the order of delivery until the proceeds ran out. Even if a new creditor were to come along who delivered a writ to the sheriff after the levy but before the sale, such a creditor would presumably share in the proceeds if they were sufficient. No redundant levy would be necessary. It would make no sense for the sheriff to give any surplus back to the debtor when another unpaid judgment creditor shows up before the proceeds are fully paid out.

Under the new law, as before, the proceeds of an execution sale are to be distributed in the order of priority of liens. Because the judgment liens attach to all leviable property on filing, there is no need for a redundant levy in order to get in line. The case law holding that one cannot levy on property *in custodia legis* should not be read to suggest that the lien

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35. See FLA. STAT. §§ 620.8504, .153 (2001).

36. Florida Limited Liability Company Act, FLA. STAT. §§ 608.401-.703 (adopted in 1982 and modified in 1993 and 1999).

37. This is because limited liability companies are normally intended to have perpetual existence, and individual shareholders lack the ability to force dissolution. See FLA. STAT. § 608.441 (2001). A partner, on the other hand, can normally force dissolution of the partnership and distribution of the assets at will. See *id.* § 620.8801.

38. *Young v. Stoutamire*, 179 So. 797, 799-802 (Fla. 1938); *Adams v. Burns*, 172 So. 75, 79 (Fla. 1936).

39. *Adams*, 172 So. at 79.

40. *Flagship State Bank v. Carantzas*, 352 So. 2d 1259, 1261 (Fla. 1st DCA 1977).



acquired by central filing does not apply to property in the possession of the sheriff at the time of filing.

## II. HOW ONE ACQUIRES THE LIEN; CONTENTS OF THE JUDGMENT LIEN CERTIFICATE

Once a judgment has become final and enforceable, the holder of the judgment may acquire the judgment lien by filing a judgment lien certificate with the Department of State in accordance with Florida Statutes section 55.203.<sup>41</sup> The Department is to maintain a database accessible to the public via the Internet. On filing, the Department will create a record and assign a unique file number to the record.<sup>42</sup> All subsequent documents relating to the original certificate, such as correction statements, will be indexed according to this file number.<sup>43</sup> The Department also has prescribed mandatory forms of all the documents to be filed.<sup>44</sup>

The judgment lien certificate requires a great deal of information, which is intended to make it possible to correctly identify and locate the parties to the judgment, including legal names, registered names, addresses, and usually the social security or federal employer identification number of the debtor.<sup>45</sup> In the case of a default judgment, the creditor may have had no way to discover the debtor's social security number, so it is required only if included in the judgment.<sup>46</sup> This creates the possibility that other individuals with the same name might be mistaken for the judgment debtor. When this happens, the person who is the object of the mistake may record a correction statement that corrects the identification error.<sup>47</sup> To permit interested persons to estimate the amount outstanding on the debt, the certificate must contain the amount of the money judgment and the interest rate applicable at the time.<sup>48</sup>

In at least two ways, the new law is sympathetic to judgment creditors faced with filing a judgment lien certificate. First, in the case of a joint judgment against numerous debtors, the creditor need record only one

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41. FLA. STAT. § 55.203(2). Taxing authorities may record a warrant instead of a judgment lien certificate. *Id.* § 55.203(2)(b).

42. *Id.* § 55.203(4)(b), (d).

43. *Id.* § 55.203(4)(f).

44. *Id.* § 55.203(6). The forms may be downloaded from the Department's web site, available at <http://www.sunbiz.org>.

45. FLA. STAT. § 55.203(1) (2001).

46. *Id.* § 55.203(1)(b).

47. *See id.* § 55.207(2)(d). The correction statement permits the person recording it to indicate the manner in which the person believes the record should be corrected to cure any inaccuracy. *Id.*

48. *Id.* § 55.203(1)(f). Although the official interest rate on Florida judgments varies from year-to-year, the rate at the time the judgment is entered remains constant on that judgment. *Id.* § 55.03(3).

certificate, which will then contain the identifying information as to all of the judgment debtors.<sup>49</sup> The database will be indexed according to the name of each judgment debtor.<sup>50</sup> Second, certain flaws in the information provided do not undermine the effectiveness of the certificate.<sup>51</sup>

### III. CORRECTION, AMENDMENT, AND TERMINATION

The central database will simply contain all the records filed in it. The Department of State will not check to see that a document is correct, nor that the person recording the document has a right to do so. If a judgment lien certificate is incorrect, someone will probably have an interest in correcting it. The judgment lien creditor is specifically authorized to record amendments, which may take numerous forms, such as termination, partial release, or change of any information on the record.<sup>52</sup> If the debt has been satisfied in whole or in part and the judgment lien creditor does not bother to record a termination or release, the judgment debtor may demand in writing a statement acknowledging the release from the judgment creditor.<sup>53</sup> Either party may record the statement, but failure to supply it within thirty days may subject the judgment creditor to liability of \$100 plus any actual or consequential damages, including attorney's fees, caused by the failure.<sup>54</sup>

It also is possible that third parties might want to correct a record, particularly people who have been mistaken for the judgment debtor. Accordingly, the statute permits any person to file a correction statement stating that he or she believes the record to be inaccurate or wrongfully

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49. Florida Statute section 55.203(1)(a) calls for the name of *each* judgment debtor. *Id.* § 55.203(1)(a).

50. *Id.* § 55.203(4)(e).

51. Florida Statutes section 55.203(5) states: "A judgment lien certificate substantially satisfying the requirements of this section is effective even if it has minor errors or omissions that make the filing seriously misleading." *Id.* § 55.203(5). This language was added by the Glitch Bill. It significantly changed the original language, which said minor errors that are *not* seriously misleading do not effect validity. I do not know who made this change, nor do I understand it. How does one make *minor errors* that are *seriously misleading*? Presumably, the change has made it more protective of errant filers than the original version, which I had taken from Article 9 of the U.C.C.

52. *Id.* § 55.206(1). The judgment creditor may also file amendments providing for continuation and tolling of termination under Florida Statutes section 55.204(4) and (5). *Id.* There is no indication as to the legal effect of such recordings. The sections on continuation and tolling seem to stand on their own. As discussed in Part VI, below, the judgment lien continues in itemized property when the requirements of Florida Statutes section 55.204(4) are met, and lapse is tolled when the requirements of Florida Statutes section 55.204(5) are met. Filing as to these events is not required.

53. *Id.* § 55.206(2).

54. *Id.*

filed.<sup>55</sup> One searching the record must understand that the filing of such a statement does not correct the error, nor does it affect the judgment lien.<sup>56</sup> If a correction statement says, "That Jeff Davis is not this Jeff Davis," it merely notifies persons searching the record that a dispute or a question of identification exists. It warns them to proceed with caution. The Department of State has no obligation to resolve these problems.<sup>57</sup> If interested parties cannot resolve them informally, resolution will require litigation.

#### IV. THE TWO-YEAR TRANSITION PERIOD: PRESERVATION OF INCHOATE LIENS OBTAINED UNDER PRIOR LAW

When the new lien law went into effect on October 1, 2001, it displaced the old lien law. Delivery of a writ of execution to a sheriff still commences the execution process, and sheriffs proceed to levy on property described in the instructions for levy, but sheriffs no longer docket writs of execution and delivery no longer creates inchoate liens. What, then, is to become of all of the countywide inchoate liens created under the prior law? Two contradictory policies compete for recognition here. The first policy, and one of the primary justifications for the change in the law, is that the buildup of inchoate liens held by passive judgment creditors waiting around for someone else to do the work should be eliminated. However, a second policy objective of the new law is that at least the diligent judgment creditors who once held these inchoate liens should be treated fairly. Fairness would seem to require at least that these creditors be given a reasonable opportunity to retain their place in line. Accordingly, the new law gives them a two-year window in which to hold their place in line in the county by recording a judgment lien certificate.<sup>58</sup> On filing prior to October 1, 2003, the result will be a statewide lien effective on the date of recording, and a lien on property remaining in the specific county that relates back to the date on which the writ was originally docketed with the sheriff.<sup>59</sup> Once the two-year window closes, absent the filing of a judgment

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55. *Id.* § 55.207(1).

56. Florida Statutes section 55.207(4) states, "The filing of a correction statement does not affect the effectiveness of the judgment lien or other filing." *Id.* § 55.207(4).

57. *See id.*

58. *Id.* § 55.208(3).

59. *Id.* § 55.208(2). Like all of the new judgment liens, these will endure for five years from the date of filing, which means that some of them will not lapse until seven years after the effective date. *Id.* § 55.204(1). If the issue arises as to how the holders of these pre-dated liens will prove the date of delivery to the sheriff, the answer is that rather than require the sheriffs to maintain their dockets for seven years, the statute requires that the creditor include in the judgment lien certificate a sheriff's certification of the date of docketing. *See id.* § 55.203(1)(h). This will require the sheriffs to maintain their dockets for only two years. For creditors disinclined to pay the sheriff's fee for

lien certificate, the inchoate lien is deemed abandoned.<sup>60</sup> A careful reading of Florida Statutes section 55.208 discloses a conceptual problem. Subsection (1) says the lien created by the prior delivery of the writ, meaning the inchoate lien, continues during the two-year period.<sup>61</sup> Subsection (2) says that filing a judgment lien certificate during that period creates a judgment lien that dates back to the date of delivery.<sup>62</sup> This poses the question: what is the effect of the continuing inchoate lien prior to the filing? One could argue that its effect is as before: if any creditor levies on property in the county, the result is a true lien on the seized property, and the proceeds of sale should go first to the previously delivered writ holder. But this conclusion is contradicted by the statutory requirement that the sheriff distribute the proceeds to the first priority judgment lien holder.<sup>63</sup> The sheriff has no statutory authority to distribute proceeds of sale to a person who has not filed a judgment lien certificate. To permit distribution to unfilled writ holders would undermine the goal of eliminating secret liens. The new statute, in effect, prohibits following the old process. Thus, the continuation of the inchoate lien during the two-year window serves simply as the conceptual basis for the relation back to the date of delivery of the writ of a properly filed judgment lien. By the simple act of filing, these creditors obtain a five-year judgment lien that dates back to the docketing of the original writ. Absent a new filing, the holder of a previously delivered writ has nothing.

Whenever the legislature significantly alters existing rights, the question arises whether constitutional protections have been violated. The constitutions of both the State of Florida<sup>64</sup> and the United States<sup>65</sup> provide that no person shall be deprived of property without due process of law. Thus, the question here is whether the statutory interference with the rights of the holders of the common law inchoate liens obtained by delivering writs of execution to a sheriff deprives them of property without due process of law. The simple answer is that it does not, because these inchoate liens are not property.<sup>66</sup> As the Florida Supreme Court stated in the seminal case adopting the inchoate lien, the "lien does not constitute,

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certifying this date, the statute permits a creditor, alternatively, to attach an affidavit in which the creditor attests that it has in its possession documentary evidence of the claimed date of docketing.  
*Id.*

60. *Id.* § 55.208(3).

61. *Id.* § 55.208(1).

62. *Id.* § 55.208(2).

63. *Id.* § 56.27(1)-(2). These sections require payment to the priority lien holder under §§ 55.202, 55.204(3), and particularly 55.208(2), but not § 55.208(1). *Id.*

64. FLA. CONST. art I, § 12.

65. U.S. CONST. amend. V.

66. *See Love v. Williams*, 4 Fla. 126, 134 (Fla. 1851).

*per se*, a right of property in the thing itself, but a right to levy upon and sell it for satisfaction of the debt.”<sup>67</sup>

To understand this conclusion, one must understand that the inchoate lien, though extending to the geographic boundaries of the county, does not, of itself, create creditor rights in or affect the debtor’s rights in property. It is not until the sheriff levies on a specific item of the debtor’s property that the inchoate lien has meaning. The debtor acquires true lien rights in the property levied upon through the statutory execution process. The inchoate lien simply identifies the date on which the true lien is deemed to attach, that being the date on which the writ was delivered to the sheriff. In other words, the inchoate lien is merely a potential date to which a true lien on property will refer, if a true lien is ever obtained. Until then, as the debtor’s property is transported into and out of the county, the inchoate lien clicks on and clicks off, waiting for the sheriff to seize something.

As stated in *City of Sanford v. McClelland*,<sup>68</sup> to be sufficiently vested, a right in property must be an immediate right of present enjoyment or a present fixed right of future enjoyment.<sup>69</sup> Rights that can be extinguished merely by transporting goods across the county line are not fixed interests in the goods. Similarly, one cannot have a property interest in unidentified property. Until a creditor discovers property of the debtor and causes the sheriff to levy on it, there is no fixed right in specific property. The right must have become title, legal or equitable, to the present enforcement of a demand.<sup>70</sup> Such vested substantive rights are to be distinguished from inchoate, procedural remedies, which are not entitled to constitutional protection.<sup>71</sup>

## V. LAPSE OF THE JUDGMENT LIEN; OBTAINING A SECOND JUDGMENT LIEN

As stated above, the two primary goals of the new law are to protect innocent parties from what is effectively a secret lien and to put an end to the discouragement of diligent judgment creditors caused by the buildup of prior inchoate liens held by passive judgment creditors waiting around for somebody else to find and liquidate the debtor’s nonexempt property. The notoriety of and ease of access to the centrally filed judgment lien greatly reduces the secrecy problem. All purchasers will at least have notice of the judgment lien, if not actual knowledge. However, left alone,

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67. *Id.*

68. 163 So. 513 (Fla. 1935).

69. *Id.* at 514-15.

70. *In re Will of Martell*, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1982).

71. *Div. of Workers Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982).

a statewide lien good for the twenty-year duration of a judgment would surely make the buildup problem worse than it is under the current law.

To reign in the buildup problem, these new centrally filed judgment liens must disappear at some point, but at what point? The matter was taken up by a joint meeting of the Financial Services Committee and the Bankruptcy/U.C.C. committee of the Business Section of the Florida Bar. I argued that the lien ought only to last as long as the creditor is diligently seeking to recover property of the debtor. Creditors ought not, I continued, be able to sit by passively and benefit from the diligent efforts of others. Accordingly, I recommended that the lien lapse after one year, and that a creditor who cannot find and levy on assets of the debtor within a year ought to lose its place in line. My recommendation could not have fallen on ears more deaf. The lawyers agreed that the liens needed to lapse at some point, but felt that sitting around waiting and hoping for a while longer than a year should be permitted. Ultimately, the five-year mark was chosen, which coincides with the duration of a financing statement under U.C.C. Article 9.<sup>72</sup>

The next question that arose was whether the lien should be subject to continuation, as is an Article 9 financing statement, by a new recording. I pointed out that California, one of the few states with a similar law, provides for a five-year lien and does not permit a second lien.<sup>73</sup> Some of the lawyers argued that a creditor that records a second time is diligent enough to deserve to hold its place in line. But the reality is that numerous lawyers and institutions have automated systems for filing continuation statements, which by no means reflect diligent effort. The resulting compromise is this: at any time during the six months prior to or the six months following lapse, the judgment creditor may record a second judgment lien certificate and obtain a second five-year judgment lien. But the second lien is a new lien, and not a continuation of the first. If no intervening judgment liens have been recorded, the effect is a first-priority lien for a period of ten years. However, if subsequent judgment creditors have also recorded certificates in the name of the same debtor, the second lien goes to the end of the line, and the erstwhile subordinate liens move up. As the subordinate liens of would-be diligent creditors move up, the insulation of the debtor by the buildup of passive lien holders is reduced.

When the second lien lapses, there is no right to a third. Any judgment creditor, however, may levy execution at any time.<sup>74</sup> If the levying creditor has no judgment lien at the time of levy, either because no certificate was properly recorded or because of lapse, the levying creditor obtains a lien

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72. FLA. STAT. § 679.403(2) (repealed 2001) (current version at FLA. STAT. § 679.515(1) (2001)).

73. CAL. CIV. PROC. CODE § 674 (2001).

74. FLA. STAT. § 55.205(1) (2001).

whose effective date is the time of levy. This lien is, of course, subordinate to any previously recorded liens that have not lapsed.

## VI. HOT PURSUIT; THE ITEMIZED LIEN

Imagine that a diligent judgment creditor has pursued the debtor for five years and is finally about to levy on property of the debtor when, just before the levy is accomplished, the lien lapses. The resulting execution lien would date from the moment of levy, at the end of the line behind all the liens that had been filed in the preceding five years. If the goal of the legislation is to reward diligent creditors, this one should clearly be protected from lapse, and it is. If a judgment lien creditor delivers instructions identifying leviable property to a sheriff, the lien continues in the identified property for ninety days beyond lapse.<sup>75</sup> This should give the creditor time to effectuate levy. Of course, the debtor may get wind of the prospective levy and remove the property to another county, or worse. In such a case, the creditor may obtain continuation of the lien by court order if it can show that extraordinary circumstances have prevented levy.<sup>76</sup>

## VII. EFFECTIVE DATE OF THE LIEN AND PRIORITY

The effective date of the lien is normally the date on which it is filed.<sup>77</sup> The single exception to this general rule, mentioned above, is the lien of a judgment creditor who obtained an inchoate lien under the prior law by delivering a writ of execution to a sheriff. By recording a judgment lien certificate within the first two years of operation of the new law, the effective date of the resulting judgment lien on property remaining permanently in that county is the date of the original delivery of the writ of execution to the sheriff.<sup>78</sup> As to property outside the county, or property

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75. *Id.* § 55.204(4). The language of section 55.204(4)(b) is unfortunate. During the drafting process, a sentence fragment intended to reside elsewhere wandered onto the end of subsection (b). As originally passed, it provided that such judgment lien will continue only if: "(b) The levy had been delivered to the sheriff prior to the date of lapse of the lien *to permit the sheriff to act.*" *Id.* § 55.204(4)(b) (emphasis added). I alerted the drafters of the Glitch Bill of the need to delete the fragment, but they failed to do so. The tenacious fragment remains. It should be ignored.

76. *Id.* § 55.204(4)(c).

77. *Id.* § 55.202(c).

78. *Id.* § 55.208(2).

that permanently leaves the county,<sup>79</sup> the effective date of the lien is the date of filing.

### A. *Priority Disputes Among Competing Judgment Liens*

Priority among competing judgment liens that have not lapsed is determined by the order of the effective dates of the liens.<sup>80</sup> Normally, this means priority is determined in the order of filing. This is the case even as to after-acquired property.

**ILLUSTRATION 1:** Suppose the debtor owned a crane that was located in Alachua County on October 1, 2001. The following winter, Creditor A records in January, Creditor B records in February, and in March the debtor acquires a new backhoe. In April, Creditor B discovers the equipment and levies on both the backhoe and the crane. Who has priority as to each piece of equipment?

The liens attach to the crane at the time of filing, A's lien in January and B's in February. Because a lien cannot attach to the debtor's interest in property until the debtor acquires an interest, both liens attach to the backhoe simultaneously, in March. Nevertheless, Creditor A will have priority over Creditor B as to both the crane and the backhoe. Even though Creditor B is the diligent one who discovered both pieces of equipment and levied execution on them, Creditor A will be paid first out of the proceeds of both.

Where a judgment creditor has obtained an inchoate lien under prior law, the effective date is not the date of filing, and priority may not follow the order in which liens were filed.

**ILLUSTRATION 2:** Suppose the same facts as in Illustration 1, except that Creditor B had previously docketed a writ of execution with the sheriff of Alachua County under the prior law, then filed in February. Who has priority as to the crane and the backhoe?

Creditor B will now have priority as to the crane, even though Creditor B filed after Creditor A. Having filed between October 1, 2001 and

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79. The language of Florida Statutes section 55.208(2) states that the lien relates back to the original date of delivery to the sheriff as to property located in the county on October 1, 2001, and "that remains continuously in that county thereafter." *Id.* § 55.208(2). This should be read in a manner that is favorable to the creditor as regards to property that normally moves, such as cars, farm equipment, and the like. If such property is normally housed in the county, temporal departure from the county and return should not cut off the original date.

80. *Id.* § 55.202(3).



October 1, 2003, the effective date of Creditor B's lien on the crane is the date on which the writ was docketed. However, Creditor A will have priority as to the backhoe because it was acquired after October 1, 2001. The effective date of Creditor B's lien predates the date of filing only as to property owned by the debtor and located in the county on that date. Creditor A would also have priority as to any property located outside of Alachua County.

In the above example, Creditor A was probably surprised to have filed first, only to lose the crane to a subsequent filer who had previously acquired an inchoate lien in the county. If Creditor A had searched the sheriff's file, vulnerability to Creditor B would not have come as such a surprise. The question arises: what could Creditor A do, if anything, to reduce this vulnerability? There is some uncertainty here, but surely the sooner A completes the execution process, the better off A will be. Once execution is complete, that is, once the goods are levied upon, sold, and the proceeds distributed to A, B's subsequent filing of a judgment lien certificate will be meaningless. The sheriff's sale obviously cuts off the debtor's interest in the goods, so B's filing creates no lien on the goods, nor does it follow the proceeds.<sup>81</sup> But suppose B were to file at some point during the execution process. Is there a point before completion when A is not vulnerable to B's power to file and establish a lien that related back to a time prior to A's?

**ILLUSTRATION 3.** Creditor A files a judgment lien certificate in January and instructs the sheriff to levy on the crane. In February, the sheriff levies on the crane. A then searches the record and gives the sheriff an affidavit saying that A's is the only judgment lien that has been filed. In March, Creditor B, who had docketed a writ of execution with the sheriff under the prior law, files a judgment lien certificate. In April, the sheriff sells the crane, and is about to distribute the proceeds according to the affidavit when B appears, demanding that the sheriff pay B's judgment first, leaving any surplus to A.

How should the sheriff respond to B's demand? Under the statute, after paying the sheriff's and levying creditor's costs, the sheriff is to pay "the priority lienholder under § 55.202, § 55.204(3), or § 55.208(2). . . ."<sup>82</sup> Had B not filed, the sheriff would have no authority to pay B. Having filed, B now holds the highest priority judgment lien under section 55.208(2),

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81. *Love v. Williams* made clear that the holder of a prior inchoate lien who, through sheriff's error, was not paid, could not follow either the goods or the proceeds of a completed execution sale. See *Love v. Williams*, 4 Fla. 126, 137-38 (Fla. 1851).

82. FLA. STAT. § 56.27(1) (2001).

because B's lien dates back to the previous delivery of the writ to the sheriff under the prior law. Thus, the statute requires the sheriff to pay B the highest priority judgment lien. However, the sheriff is relieved of liability by paying according to the affidavit,<sup>83</sup> which does not mention B, because A delivered the affidavit to the sheriff before B had filed. Thus, it would seem that the sheriff could pay either one. Paying the first priority lien holder is authorized by statute, and paying according to the affidavit places the sheriff in the statutory safe harbor. As I discuss below,<sup>84</sup> in such a case, one hopes the sheriff would pay according to priority, but it would not be surprising if the sheriff were first to demand that B either procure A's written concession that its claim is subordinate, or produce a court order to that effect.

### *B. Priority Disputes Between Judgment Liens and Security Interests*

The familiar rule here is that an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.<sup>85</sup> The chief exception is that a purchase money security interest perfected within twenty days after the debtor receives possession of the collateral defeats a lien creditor whose lien was acquired prior to perfection.<sup>86</sup> The new law makes clear that the definition of "lien creditor" includes the holder of a judgment lien.<sup>87</sup> As to property owned by the debtor at the time of filing, the judgment creditor "becomes a lien creditor" at that time, and defeats any security interest that is unperfected at that time. However, application of the rule to after-acquired property is not so simple. As stated above, one cannot become a lien creditor as to later acquired property until the debtor acquires it.

**ILLUSTRATION 4:** Suppose Debtor is a retail seller of home furnishings. On October 1, 2001, the store is full of inventory. The following January, Creditor A records a judgment lien

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83. *Id.* § 56.27(5). The safe harbor here is intended to protect sheriffs who pay according to the information in the affidavit from liability for incorrect payment. Curiously, the section speaks only in terms of liability for wrongful levy, which, at least on its face, is different from liability for wrongful payment.

84. *Infra*, text accompanying note 119.

85. FLA. STAT. § 679.3171(1)(b)1 (2001).

86. *Id.* § 679.3171(5).

87. Florida Statutes section 679.1021(1)(zz)1 defines lien creditor, but does not include an explicit provision stating that the holder of a judgment lien is a lien creditor. This was included in the previous version of the U.C.C. Article 9 definition of lien creditor. *See id.* § 679.301(2). The omission in 2001 of the amendments to Article 9 was inadvertent. It is probably unnecessary, as the definition of lien creditor would obviously include the judgment lien. Its omission was certainly not intended to suggest that holders of the judgment lien are not lien creditors for Article 9 purposes.

certificate. In February, Creditor B takes a security interest in existing and after-acquired inventory and perfects. In March, the debtor receives a truckload of new inventory. Who has priority as to the old and new inventory?

Creditor A clearly has priority in the old inventory. The lien attached at the time of recording, well before Creditor B obtained a perfected security interest. However, as to the new inventory, the lien and security interest attach simultaneously when the debtor acquires an interest in it. If Creditor B supplied the purchase money for the new inventory and perfected before or within twenty days of delivery, Creditor B would have priority. However, the secured creditor may not qualify for the special protection for purchase money lenders, yet may rely, as many inventory financers do, on the after-acquired property clause. In such a case, the judgment lien statute gives the nod to the secured party's after-acquired property clause, as long as the security interest was perfected before the debtor acquired an interest in the property.<sup>88</sup> Otherwise, the new judgment lien would have the potential to interfere unduly with well-established financing patterns.

### *C. Priority Disputes Between Judgment Lien Holders and Buyers*

For the most part, the new statute protects innocent transferees from unfair surprise by publicizing the existence of a judgment lien in a readily accessible central file. But three types of buyers have been singled out for additional protection: buyers in the ordinary course of the seller's business,<sup>89</sup> consumer buyers from consumer sellers,<sup>90</sup> and buyers of corporate stock.<sup>91</sup> It has long been the rule in secured-transactions law that retail or wholesale buyers of the inventory of a seller who is in the business of selling inventory should not have to worry about claims of a secured inventory financer,<sup>92</sup> nor should such buyers have to worry about claims of persons who have entrusted goods to a merchant who deals in goods of the kind.<sup>93</sup> This policy obviously protects the stability of retail and wholesale

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88. *Id.* § 55.205(2). As originally passed, a security interest in after-acquired property took priority over a judgment lien only if the security interest was perfected prior to the filing of the judgment lien. The Glitch Bill altered this rule in favor of secured creditors, permitting the security interest in after-acquired property to take priority as long as it is perfected before the debtor acquires the property. *Id.* I do not know who sponsored this change. It just appeared in the Glitch Bill one day. I objected to it, but to no avail.

89. *Id.*

90. *Id.* § 55.205(3).

91. *Id.* § 55.205(4).

92. *See, e.g., id.* § 679.320(1).

93. *See, e.g., id.* § 672.403(2).

markets. The judgment lien statute, unlike the prior inchoate lien, reflects this policy and states explicitly that buyers in the ordinary course of the seller's business take free of any judgment liens recorded against the seller.<sup>94</sup>

It necessarily follows that buyers *not* in the ordinary course of business need to be concerned about the judgment lien.

**ILLUSTRATION 5:** Creditor A records a judgment lien certificate in the name of Joe's Catering in January. In February, Joe's Catering upgrades its equipment. Joe's sells two used commercial ovens and its delivery van to Barnaby. Barnaby checks to be sure that no creditor has filed a financing statement on Joe's equipment, and checks to be sure that no security interest is noted on the van's certificate of title. Barnaby pays \$20,000 cash and takes possession of the ovens and the delivery van. May Creditor A levy execution on Barnaby's new purchases?

Yes, Creditor A wins. The proceeds of the sheriff's execution sale go first to pay Creditor A. Since caterers sell food, not equipment, in the ordinary course of their business, Barnaby bought the equipment subject to the judgment lien. Barnaby's lesson: It is no longer sufficient solely to check for secured creditors. Commercial buyers must also check the central file for judgment liens before making a significant purchase from a person not in the business of selling goods of the kind.

The vast majority of non-ordinary-course buyers, other than consumer buyers from consumer sellers, are professionals, such as buyers in liquidation sales and dealers in used commercial equipment. It is no great burden to expect these professionals to check the judgment lien registry before buying. In some instances, such as where a professional liquidator disposes of the assets of a failed business or a house full of valuable belongings in an estate sale, special arrangements will have to be made, such as a court order or an agreement by the lien holder to permit sales free of the lien, which then attaches to the proceeds of the sale.

The treatment of titled motor vehicles and mobile homes under the judgment lien statute deserves special mention. The judgment lien is intended to reach all personal property subject to execution in this state, including motor vehicles and motor homes.<sup>95</sup> Recognizing that security

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94. *Id.* § 55.205(2).

95. An argument to the contrary might plausibly be based on the specificity of the Title Certificate statute. Florida Statutes section 319.27(2) states:

No interest of a statutory nonpossessory lienor; the interest of a nonpossessory execution, attachment, or equitable lienor; or the interest of a lien creditor as

interests and other liens on such goods must normally be noted on the certificate of title to be effective against subsequent purchasers and creditors, permitting the judgment lien to attach to such goods solely as a result of central filing represents a significant departure from existing practice. We thought about excepting such goods from the statute, but realized that for many kinds of debtors, the most significant kinds of nonexempt property they own are motor vehicles and mobile homes. To exempt such goods from the statute would profoundly undermine its effectiveness. By protecting buyers in the ordinary course of business and consumer buyers from consumer sellers, we, the legislators, and legislative staff members we worked closely with, concluded the dangers of unfair surprise are sufficiently minimized.

The world in which this legislative decision is most likely to have impact is that of the motor vehicle dealers. Most motor vehicle salespersons are anxious to close a deal, and, in taking a trade-in, would prefer to rely on a clean certificate of title than to have to also check the central file for judgment liens, which will not only take a little time, but might also queer a few deals. As a practical matter, except in the unusual case where the judgment lien creditor is closely familiar with the debtor's affairs, the judgment lien creditor will not pursue trade-ins into the hands of the dealer, particularly since dealers usually only hold on to trade-ins briefly. Since professional buyers at a dealer auction are probably buyers in the ordinary course of business, pursuing a trade-in through a dealer is unlikely to be highly rewarding. Unless the trade-in is of great value, such as a \$100,000 tow truck, or a \$75,000 BMW, a little sloppiness on the part of the salesperson will probably not affect many transactions. On the other hand, for a high-end dealer in vehicles of great value, it is not unreasonable to expect that they check the central file and turn down a deal or two. One of the goals of the new statute is to make it more difficult for people who are not paying their judgments to deal in nonexempt goods.

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defined in [Ch. 679], if nonpossessory, shall be enforceable against creditors or subsequent purchasers a for valuable consideration unless such interest . . . is noted upon the certificate of title . . . prior to the occurrence of the subsequent transaction.

*Id.* § 319.27(2).

Although the Judgment Lien statute is subsequent to the Title Certificate statute, one could argue that by using the broad language of Florida Statute section 55.202(2), the legislature did not intend to overrule the specific language of Florida Statutes section 319.27(2). The argument should fail. Florida Statutes section 55.202(2) explicitly exempts four kinds of property: fixtures, money, negotiable instruments, and mortgages. *Id.* § 55.202(2). In carefully deciding *not* to exempt titled vehicles from the judgment lien, the broad language used was clearly intended to reach titled vehicles.

Buyers in the greatest danger of unfair surprise are buyers who are not professionals, most frequently consumer buyers purchasing from consumer sellers. Buyers of goods from neighbors, at yard sales, on the Internet or in the classified ad section of the newspaper do not usually bother to search for competing liens. Article 9 of the U.C.C. protects such buyers who buy without knowledge of security interests in goods held for personal use by the seller. Usually, they buy free of the security interest.<sup>96</sup> With the addition in the Glitch Bill of section 55.205(3), Florida Statutes, such buyers who buy for value without knowledge of a judgment lien are also protected, but to a lesser degree.<sup>97</sup> They do not take free of the lien, but they usually get their money back. Such buyers are entitled, to the extent of the value paid, to a lien superior to the judgment lien.<sup>98</sup> So, if a judgment lien creditor chooses to pursue the goods in the hands of the innocent buyer, it must return to the buyer the value paid.<sup>99</sup> The creditor would be likely to do so only if the buyer had paid substantially less than the fair market value of the goods. In such a case, the transfer would normally be voidable as a fraudulent conveyance,<sup>100</sup> so the benefit of the lien is that it saves the creditor from having to prove the market value of the goods in an avoidance action.

At the very end of the 2001 legislative session, in negotiations between bank representatives and the staff of the Senate Judiciary Committee, this protection was limited in two additional ways.<sup>101</sup> The protection does not apply to a transfer to a relative or an insider as defined in Florida Statutes section 726.102.<sup>102</sup> Furthermore, a complex formula limits the protection in large transactions exceeding a value of \$10,000.<sup>103</sup>

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96. Florida Statutes section 679.320(2) protects such buyers unless the secured party has filed a financing statement covering the goods. Because most security interests in consumer goods are purchase money security interests, which are perfected without filing, *id.* § 679.302(1)(d), most consumer buyers from consumer sellers are well protected here. However, in the unusual case where a creditor files as to consumer goods, the protection is lost.

97. *See id.* § 55.205(3).

98. *Id.*

99. *Id.*

100. *See id.* § 726.105.

101. This late amendment added subsections (a) through (g) to Florida Statute section 55.205(3). Subsections (b) and (c) do nothing of substance. They provide that these consumer-to-consumer sales are not protected if they amount to fraudulent conveyances under Florida Statutes section 726.105 or the Bankruptcy Code, or if they are fraudulent conversions under Florida Statutes section 222.30. This would be the case in any event.

102. FLA. STAT. § 55.205(3)(a) (2001).

103. If the value of the transfer falls between \$10,000 and \$20,000, 25% of it is unprotected. If the value falls between \$20,001 and \$25,000, 50% of it is unprotected. If the value falls between \$25,001 and \$30,000, 75% of it is unprotected, and if the value exceeds \$30,000, it is wholly unprotected. *Id.* § 55.205(3)(d)-(g). Because this curious formula is discontinuous from range to range, one can imagine heated litigation over the value of the goods transferred. If valued at

In the vast majority of cases, this risk of surprise in these consumer-to-consumer sales will be minimal, because the judgment lien holder will not discover the sale, or if discovered, will not think it worthwhile to pursue the goods into the hands of the buyer. There is no evidence that under the prior law holders of inchoate liens pursued property sold in this manner, although they could have. In the unlikely case that a judgment lien is successfully asserted against a truly innocent buyer who happens to be an insider, a relative, or a buyer of goods worth in excess of \$10,000, the only remedy is an action against the seller for breach of implied warranty of good title.

Finally, the Glitch Bill added protection to buyers of stock. Good faith buyers for value without knowledge of the lien take free of the lien.<sup>104</sup> The lien attaches to corporate shares in the hands of the debtor, and follows the shares if they are transferred as gifts. However, it would not be seemly for the lien to interfere with securities markets.

#### *D. Priority Disputes Between Judgment Lien Holders and the Trustee in Bankruptcy*

With the astonishing increase in the frequency of bankruptcy in recent years, the legal relationship between judicial lien holders and the trustee in bankruptcy has become a much more important factor in the design of debtor-creditor law than it once was. Today, if a judgment creditor levies on a significant asset of a business debtor, it is commonplace to expect the debtor immediately to file bankruptcy. When this happens, the prior inchoate-lien law provided one clear advantage over the lien-on-levy rule adopted by the majority of states. Under the majority approach, if the debtor files bankruptcy within ninety days of the levy, the lien acquired at the moment of levy is voidable by the trustee as a preferential transfer.<sup>105</sup> In contrast, the ministerial and largely secret act of delivering a writ of execution to a sheriff never, of itself, drove debtors into bankruptcy. Thus, by waiting ninety-one days to levy, the debtor's bankruptcy filing did not endanger the creditor's lien, which related back to the date of delivery of the writ, more than ninety days prior to bankruptcy, outside the trustee's avoidance window.<sup>106</sup>

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\$20,000, the amount protected is \$15,000. If valued at \$20,001, the amount protected is only \$10,000. *See id.*

104. *Id.* § 55.205(4). Actually, consistent with Article 8 of the U.C.C., the protection extends only to buyers for value without *notice* of the lien as defined in Florida Statutes section 678.1051. *Id.* Most of the events other than knowledge giving rise to notice are unique to securities transactions. The Glitch Bill amended this section to make clear that neither the filing of an Article 9 financing statement nor a judgment lien certificate operates as notice. *See id.*

105. 11 U.S.C. § 547(b) (2001).

106. *Id.*

The new law retains this feature. Recording a judgment lien certificate is not, alone, likely to cause a debtor to file bankruptcy. Because it is a more public event than docketing a writ in the sheriff's file, there is an increased chance the debtor will know about it. In fact, having suffered the entry of a final judgment, the recording of a certificate without delay would be expected. In some instances, well advised judgment debtors will file bankruptcy before a levy occurs in order to defeat the judgment creditor's lien. But it is only the levy on a significant asset that truly interferes with the debtor's ability to function. Normally, if the creditor waits ninety days to levy, and if the levy then forces the debtor into bankruptcy, the new judgment lien on property owned by the debtor for more than ninety days<sup>107</sup> is not subject to preference attack.

### VIII. LEVY, SALE, AND DISTRIBUTION OF PROCEEDS

Much of the law here remains unchanged. The process through which one causes the sheriff to levy on property of the debtor has not been changed. One obtains a writ of execution, delivers it to the sheriff along with instructions for levy, and the sheriff levies. Delivery of the writ engages the sheriff's statutory obligation to levy, but it will no longer create an inchoate lien, and the sheriff will no longer keep a registry of docketed writs. At the moment of levy, if the levying creditor has a valid judgment lien, the execution lien will merge with the judgment lien and date from the time of filing of the judgment lien certificate. If the levying creditor does not have a valid judgment lien, the act of levying will create an execution lien, which dates from the time of levy.

The changes occasioned by the new law increase the duties of the levying creditor. First, the four-week newspaper advertisement requirement remains the same,<sup>108</sup> but the content of the notice to be sent by certified mail is more extensive. In addition to a copy of the notice of sale, the notice must also include a copy of the affidavit that is now newly required by Florida Statutes section 56.27(4),<sup>109</sup> which I discuss below. Further, when levying on personalty, new people are entitled to notice. A copy of the notice and sale must now be sent not only to the debtor, but also to all secured creditors who have filed financing statements reflecting security interests in property of the kind to be sold at the execution sale and to all creditors holding valid judgment liens.<sup>110</sup> So, if a creditor has levied on

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107. See *infra* text accompanying notes 112-13. Since the lien does not attach to property until the debtor acquires it, the lien on property acquired within the ninety-day avoidance period would be vulnerable to preference attack.

108. FLA. STAT. § 56.21 (2001).

109. See *id.*

110. *Id.* Strictly speaking, the section does not say that. Somehow, the final form of the amended version of the section seems to contemplate the existence of only one judgment creditor



equipment, there is no need to notice the inventory and accounts financier, but other judgment lien creditors must be noticed.

The levying creditor now has an entirely new obligation, the section 56.27(4) affidavit.<sup>111</sup> The sheriffs were important players in the creation of the centrally filed judgment lien. They were giving up the centuries-old job of keeping the docket, and in the process, giving up the filing fees they received for docketing, so their support of the new law was politically essential. Because they would no longer be in control of the records upon which the distribution of execution sale proceeds would be based, they insisted on protection from liability for improper distribution. Enter the affidavit. Florida Statutes section 56.27(4) provides that the levying creditor must file an affidavit 1) stating that the creditor has reviewed the database, 2) providing the information contained in each judgment lien certificate indexed under the name of the debtor, and 3) stating that the creditor has no other levy in process, or if multiple levies are in process, that the creditor believes the value of the total amount of property under execution does not exceed the amount of outstanding judgments.<sup>112</sup> The sheriff who then distributes the proceeds of the sale in accordance with the information contained in the affidavit is not liable to anyone for damages arising from wrongful levy.<sup>113</sup>

How are the proceeds to be distributed? There is but a modest change here, under section 56.27(1). As usual, the proceeds go first to the sheriff for costs.<sup>114</sup> Second, the levying creditor gets \$500 as liquidated expenses.<sup>115</sup> By calling this “liquidated expenses” the intent is to make clear that the levying creditor need not prove its actual expenses.<sup>116</sup> Third, as under current law, distribution would then go to the first priority judgment lien, then to the second, and so on.<sup>117</sup>

The provision for payment of “liquidated expenses” to the levying creditor is new. The idea here is straightforward. It encourages creditor

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who has recorded a judgment lien certificate. *See id.* I am embarrassed to say that this is one of the glitches we did not find and did not fix in our Glitch Bill. Still, if there are two or three such people on record, it would be foolish not to notice them all.

111. *Id.* § 56.27(4).

112. *Id.* So, if a creditor is engaging in multiple levies, one can levy on property well in excess of one’s own claim, so long as one believes the total value of property levied upon does not exceed the total of all the unpaid judgment liens. *See id.*

113. *Id.* § 56.27(5).

114. *Id.* § 56.27(1).

115. *Id.*

116. Creditors hiring lawyers to initiate the execution will normally incur costs in this range, at the least. It would not be inconceivable, however, for the occasional low-priority creditor, proceeding *pro se*, to go after the \$500. This would not violate the spirit of Florida Statutes section 56.27(1).

117. FLA. STAT. § 56.27(1) (2001).

diligence. A junior creditor may proceed against the property of the debtor in the hope that the seized goods bring a high enough price that something will be left after the seniors are paid. Whether this proves to be the case or not, at least the levying creditor's expenses will be partially covered. In fact, the levying creditor's expenses may be a bit more than covered—a reward for taking the risk. But the fact that the expenses need not be proved raises potentially troubling questions. First, if the \$500 exceeds actual costs, should not the surplus be applied to reduce the debt? If not, is there not something punitive, or at least more than compensatory, about taking the debtor's property and applying the proceeds to enrich the levying creditor without reducing the debt? Secondly, what is to keep a clever *pro se* debtor from levying repeatedly and pocketing each time the difference between \$500 and the *pro se* costs of levying. While these scenarios are possible, the small amounts of money involved compared to the complexity of the process make it unlikely they will become a real problem. If they do, judges are usually able to find creative ways to deter them.

The above statutory directions to the sheriff are straightforward and should operate well in most cases. However, they are deficient in at least two instances. First, as discussed above, even though section 55.202(1) provides that the inchoate liens under prior law will continue for two years, the statute affords the sheriff no authority to distribute proceeds of an execution sale to these creditors unless they have filed judgment lien certificates. Surely, despite the publication efforts of the Bar and the Department of State, there will be a few judgment creditors who would have filed certificates if they had learned of the new law in time, but did not. Although the sheriffs are not required to do so, the sheriffs could take it upon themselves to provide notice here. This would be ideal.<sup>118</sup> When a sheriff receives instructions for levy prior to October 1, 2003, on what appears to be valuable nonexempt property, the sheriff could search the docket and send notice to prior writ holders who have not filed, that by doing so, they may be able to share in the proceeds.

A second instance in which the procedures are deficient is that they do not tell the sheriff what to do about judgment lien certificates filed after the levying creditor's affidavit is received, but before distribution of the sale proceeds. In most cases, the late filed certificate will be last in time and will have a claim to proceeds only if the sale produces a surplus. Because the sheriff has no duty to search the central file, the sheriff will not normally know of the new filing and will simply distribute according to the

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118. It would be impractical to try to send notice of the new law to the thousands of prior writ holders. Most, having lost interest years before the new law, would not bother to file judgment lien certificates. However, in the rare instance in which substantial nonexempt property has been located by another judgment creditor prior to October 1, 2003, notice would be meaningful, indeed.

affidavit, returning the surplus to the debtor. If the new judgment creditor makes itself known to the sheriff in time, however, the surplus should go to the new judgment creditor, rather than back to the debtor. If the late certificate is filed by a creditor who had delivered a writ to the sheriff under the prior law, again, the sheriff normally will not discover the new certificate unless the creditor makes this known to the sheriff. In such a case, the distribution should go according to statutory priority despite the late filing. In both of these instances, the late filing creditor will be asking the sheriff to distribute the proceeds in a manner other than provided in the affidavit. In such a case, the sheriff will probably be safe from liability in taking either course of action. However, it would not be surprising if the sheriff were first to require the late-filing creditor to obtain either a written concession from the other that its claim is subordinate or a court order to that effect. Regardless of how the sheriff distributes the proceeds, the sale should cut off all judgment lien claims to the property sold at execution.<sup>119</sup>

## IX. CONCLUSION

In 1995, a special committee of the Business Section of The Florida Bar began thinking about how to improve Florida's existing archaic execution lien law as it applied to personal property. Six years later, on October 1, 2001, that law was replaced by the new statewide judgment lien on personal property.<sup>120</sup> Rather than adopting the lien-on-levy approach taken by the majority of states, Florida has ventured into new territory. Although a few states have adopted the central filing approach,<sup>121</sup> Florida's law is modeled after none. It is the product of the collective effort, experience, and ideas of countless lawyers, sheriffs, county clerks, legislators, legislative staff members, and other civil servants.

In addition to remedying the unfair surprise and build-up problems, the new law has the potential to encourage voluntary payment by debtors who have the ability to pay but otherwise would not do so. The notoriety and ease of access to the central file will make it much easier for prospective landlords, creditors, buyers, and others considering dealing with someone new to discover whether that person has failed to pay his or her outstanding judgments. If this notoriety makes it more difficult for such a judgment debtor to function, this will provide added incentive to pay the judgment and clear the record.

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119. See *Love v. William*, 4 Fla. 126 (Fla. 1851), holding that even if the sheriff distributes the proceeds improperly, the sale cuts off all execution lien claims to the property sold.

120. FLA. STAT. § 55.203.

121. See, e.g., CONN. GEN. STAT. ANN. § 52.355a (1995), CALIF. PROCEDURE Ch. X § 76 (1997).

The new judgment lien law is unique and creative. In operation, it will undoubtedly prove to have some design flaws, which will require that it evolve. The Business Section will surely keep an eye on it. If necessary, the Section will propose the changes that experience shows are needed. In all, I am confident that the new law will prove to be a significant improvement in Florida Law. For my part, it has been a privilege to have been a part of the process.

